



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 19, 1997

Ms. Mary Keller
Senior Associate Commissioner
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR97-2810

Dear Ms. Keller:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 111263.

The Texas Department of Insurance (the "department") received a request for information concerning Allstate Indemnity Company and Allstate Insurance (collectively "Allstate"), which was the subject of an earlier request. In Open Records Letter No. 97-2009 (1997), this office determined that the requested information was excepted from disclosure under section 552.103(a). The requestor now re-urges his request for this information, as the litigation has concluded. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, 552.111 of the Government Code, and the attorney work product doctrine. In addition, you raise section 552.305 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Pursuant to section 552.305 of the Government Code, this office notified Allstate Insurance Company, Allstate Indemnity Company, and Allstate Property and Casualty Company of the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). Allstate asserts that the requested information is excepted from required public disclosure based on sections 552.107(2), 552.110, and 552.111 of the Government Code and pursuant to article 1.24D of the Texas Insurance Code.

Initially, we address Allstate's assertion that the company received some of the requested documents from the department with the understanding that they were confidential, and with the understanding that they were subject to a protective order. We note that information is not excepted from disclosure merely because it is furnished with the expectation that it will be kept confidential. *See, e.g.*, Open Records Decision No. 180 (1977).¹ However, section 552.107(2) provides that information is excepted from required public disclosure if "a court order has prohibited disclosure of the information."² This office has interpreted this language as protecting only information that a court has specifically ordered not to be disclosed, *i.e.*, information subject to a protective order. *See, e.g.*, Open Records Decision Nos. 309 (1982), 143 (1976). The department has submitted to this office a copy of a protective order entered by an administrative law judge governing certain material which is also the subject of this request for information. Upon review of the protective order, we note that several sections of the order specifically exclude certain types of information or documents from the order's purview. Section 1(d) of the order provides the following:

[p]rotected materials shall not include any information or documents in the public files of [the department] . . . subject to [chapter 552 of the Government Code]. Protected materials also shall not include documents or information which at the time of, or prior to, disclosure in these proceedings, is or was public knowledge, or which becomes public knowledge other than through disclosure in violation of this Protective Order.

Further underscoring the limitations of the protective order is section 16, which reads, in part:

[t]he term 'best efforts' as used in the preceding paragraph requires that the Reviewing Party's attempt to ensure that disclosure is not made by its employees *unless such disclosure is pursuant to a final order of a governmental or judicial body or written opinion of the Attorney General which was sought in compliance with subchapter G of Chapter 552 of the Texas Government Code.* (The Texas Public Information Act). The Reviewing Party is not required to delay compliance with a lawful order to disclose such information but is

¹Although Allstate also claims an exception under section 552.111 for these documents, this exception does not protect the interests of a third party such as Allstate. Therefore, Allstate lacks standing to raise this exception.

²We note that the department raises section 552.101 as a basis for asserting the protection of the protective order. We will consider the department's arguments concerning the protective order under section 552.107(2).

simply required to timely notify the party asserting confidentiality, or its counsel, that it has received a challenge to the confidentiality of the information and that the Reviewing Party will either proceed under the provisions of subchapter G of Chapter 552 of the Texas Government Code or intends to comply with the final governmental or court order.

(Emphasis added). We therefore conclude that the protective order is not intended to protect from public disclosure information governed by chapter 552 of the Government Code.

We next address Allstate's assertion that a portion of the requested information is protected from disclosure by section 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.* After reviewing Allstate's arguments and the submitted materials, we find that Allstate has not met its burden under the commercial and financial information prong of section 552.110.

Allstate also states that some of the requested information contains trade secrets. This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Facts sufficient to show the applicability of these factors have not been provided. *See* Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information). Therefore, the requested information is not excepted from disclosure under the trade secret prong of section 552.110.

Next, we address Allstate's argument that the letter dated July 20, 1995, is confidential by law. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Article 1.24D, which contains a

confidentiality provision for certain insurers' underwriting guidelines, reads in pertinent part as follows:

(a) The department . . . may request and receive copies of an insurer's underwriting guidelines. Underwriting guidelines are confidential and the department . . . may not make the guidelines available to the public. . . .

(b) This law does not preclude the use of underwriting guidelines as evidence to prosecute a violation of this code. If guidelines are used to prosecute a violation of the law, all copies of those guidelines shall be presumed confidential and subject to a protective order until all appeals on the case have been exhausted. After the exhaustion of all appeals, if an insurer is found to have violated this code, the copies of the underwriting guidelines that were used as evidence of the violation shall no longer be presumed confidential.

We are unable to determine whether the July 20, 1995, letter was used as evidence to prosecute Allstate for an Insurance Code violation, whether Allstate was found to have violated the Insurance Code, or whether Allstate has exhausted all appeals. Therefore, to the extent that the requested information is subject to article 1.24D, it must be withheld under section 552.101.

Section 552.111 of the Government Code excepts from required public disclosure an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency. This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.* The exception also protects preliminary drafts of a document and any comments or other notations on the drafts because they necessarily represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 (1990). Information created for an agency by outside consultants acting on behalf of the agency in an official capacity may be within section 552.111. Open Records Decision No. 462 (1987) (construing predecessor statute to section 552.111). However, communications between agencies and other third parties are not protected. *See* Open Records Decision No. 474 (1987) (construing predecessor statute).

We find that the twenty-nine page memorandum prepared by one of the department's experts in the litigation must be released to the requestor because this document was disclosed to a third party, Allstate, in litigation with the department. Similarly, the drafts of the consent order were disclosed to Allstate during the litigation, and may not now be

withheld under section 552.111. We agree that other portions of the requested information consist of opinion, advice, and recommendation within the policy making context that are excepted from disclosure based on section 552.111, and have marked the documents accordingly.

The department also raises section 552.111 for attorney work product. In Open Records Decision No. 647 (1996), this office established the requirements for withholding information as attorney work product under section 552.111. For information to be considered "attorney work product," a governmental body must first show that the information was created for trial or in anticipation of litigation. In order for this office to conclude that information was created in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation.

See National Tank v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993).

Second, the governmental body must show that the work product "consists of or tends to reveal the thought processes of an attorney in the civil litigation process." Open Records Decision No. 647 (1996) at 4. Although the attorney work product privilege protects information that reveals the mental processes, conclusions, and legal theories of the attorney, it generally does not extend to facts obtained by the attorney. *Id.* and authorities cited therein. In addition, records that were neither created by an attorney nor created at the direction of an attorney may not be withheld as attorney work product, regardless of the fact that they were forwarded to an attorney in connection with the litigation. *See National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993).

The department has shown that portions of the information were created for trial or in anticipation of litigation under the *National Tank* test. However, to the extent that the department has voluntarily disclosed certain documents to any third party, such as Allstate, the department has waived the protection of the attorney work product doctrine under section 552.111 as to those documents. *Cf.* Open Records Decision No. 630 (1994). We have marked the information which may be withheld under section 552.111 as attorney work product.

We do not specifically address your claimed exception under section 552.107(1) because it would not protect any information not already marked as excepted from disclosure under section 552.111. *See* Open Records Decision No. 574 (1990) (section 552.107 protects confidential communications from client to attorney and attorney's legal advice and opinions, but does not protect purely factual information).

We have marked the submitted documents in accordance with this ruling. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

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Ref.: ID# 111263

Enclosures: Marked documents

cc: Mr. John Holland
Attorney at Law
3001 Brown Trail, Suite 103
Bedford, Texas 76021
(w/o enclosures)

Mr. Roger D. Higgins
Thompson, Coe, Cousins & Irons, L.L.P.
200 Crescent Court, Eleventh Floor
Dallas, Texas 75201-1840
(w/o enclosures)